

BEFORE THE
Federal Communications Commission

WASHINGTON, DC 20554

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 FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF SECRETARY

In Re Applications of) WT Docket No. 96-41
)
LIBERTY CABLE CO., INC.	) File Nos.
)
For Private Operational Fixed	) 708777 (WNTT370)
Microwave Service Authorizations and	) 708778, 713296 (WNTM210)
Modifications	) 708779 (WNTM385)
	) 708780 (WNTT555)
New York, New York	) 708781, 709426, 711937 (WNTM212)
	) 709332 (NEW)
	) 712203 (WNTW782)
	) 712218 (WNTY584)
	) 712219 (WNTY605)
	) 713295 (WNTX889)
	) 713300 (NEW)
	) 717325 (NEW)

To: Administrative Law Judge Richard L. Sippel

**TIME WARNER CABLE OF NEW YORK CITY, PARAGON CABLE MANHATTAN
 AND CABLEVISION OF NEW YORK CITY - PHASE I'S
 MEMORANDUM OF LAW REGARDING THE ATTORNEY-CLIENT PRIVILEGE**

Time Warner Cable of New York City, Paragon Cable Manhattan and Cablevision of New York City - Phase I (collectively, "TWCNYC") hereby submit this memorandum of law regarding the application of the attorney-client privilege. By telephone conversation of January 7, 1997 with counsel for Bartholdi Cable Co., Inc. ("Bartholdi"), TWCNYC's counsel is advised that Bartholdi does *not* intend to continue its assertion of the privilege with respect to the three instances in Michael Lehmkuhl's deposition where the privilege was asserted. Nevertheless, in anticipation of the possibility that attorney-client privilege issues may arise during the course of the examination of other witnesses, TWCNYC submits this

Memorandum to set out its general position with respect to application of the attorney-client privilege in this case. TWCNYC submits this memorandum pursuant to the Order of the Presiding Judge.¹

The purpose of the attorney-client privilege is to encourage freedom of consultation between a client and his attorney by eliminating the fear of subsequent compelled disclosure of confidential communications between them. *E.g.*, Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); United States v. Suarez, 820 F.2d 1158, 1160 (11th Cir. 1987), cert. den., 484 U.S. 987 (1987); Black Television Workshop of Los Angeles, Inc., 7 FCC Rcd. 6868 (1992); Pensacola Radio Partners, 8 FCC Rcd. 3580 (Rev. Bd. 1993). Because the attorney-client privilege obscures the disclosure of evidence, "it should be construed as narrowly as is consistent with its purpose." Suarez, 828 F.2d at 1160; Black Television Workshop of Los Angeles, Inc., 7 FCC Rcd. at 6869; Raveesh K. Kumra, 5 FCC Rcd. 5607 (1990); Pensacola Radio Partners, 8 FCC Rcd. at 3581; see also University of Penn. v. EEOC, 493 U.S. 182, 189 (1990); Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1423 (3d Cir. 1991); United States v. Bernard, 877 F.2d 1463, 1465 (10th Cir. 1989).

In order for the privilege to apply, the party claiming the privilege must establish the following elements: (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made is (a) a member of a bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either an opinion

¹Order, FCC No. 96M-272, WT Docket No. 96-41 (rel. Dec. 17, 1996).

on law or legal services or assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been claimed, and not waived, by the client. Western Trails, Inc. v. Camp Coast to Coast, Inc., 139 F.R.D. 4, 8 (D.D.C. 1991); Amarin Plastics, Inc. v. Maryland Cup Corp., 116 F.R.D. 36, 41 (D. Mass. 1987); United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950); Pensacola Radio Partners, 8 FCC Rcd. at 3581; Black Television Workshop, 7 FCC Rcd. at 6869; see also Rice, Attorney-Client Privilege in the United States, § 2:1. The party claiming the privilege carries the burden of proving the existence of all the elements of the privilege, and a mere conclusory assertion that a particular element is present is insufficient proof of its existence. See Western Trails, 139 F.R.D. at 11; Black Television Workshop, 7 FCC Rcd. at 6869; Pensacola Radio Partners, 8 FCC Rcd. at 3581; see also Hillsborough Holdings Corp. v. Celotex Corp., 132 Bankr. 478, 480 (Bankr., M.D. Fla. 1991); Grossman v. Schwarz, 125 F.R.D. 376, 380, 386 (S.D.N.Y. 1989). Additionally, a claim of privilege must be raised in a timely manner. Failure to timely assert a privilege may be deemed by a court to constitute waiver by implication. Pensacola Radio Partners, 8 FCC Rcd. at 3581.

Consistent with the necessary elements of the attorney-client privilege, courts have established several more specific principles regarding the application of the privilege. First, every communication that takes place between a client and his attorney is not automatically protected by the privilege. See Western Trails, 139 F.R.D. at 13; Department of Economic Dev. v. Arthur Andersen & Co., 139 F.R.D. 295, 300 (S.D.N.Y. 1991), recon. den., 139 F.R.D. 594 (S.D.N.Y. 1991); Grossman, 125 F.R.D. at 387. To be protected by the privilege, a communication between an attorney and a client must be confidential.

"Confidential" communications are those that are not communicated to parties other than the attorney or client. Once the client or the attorney has communicated the "confidential" information to a third party, he waives the attorney-client privilege, and cannot reassert it. See In re Air Crash Disaster at Sioux City, Iowa, 133 F.R.D. 515, 518 (N.D. Ill. -- E. Div. 1990); Western Trails, 139 F.R.D. at 13-14; Bernard, 877 F.2d at 1465; Suarez, 820 F.2d at 1160; Raveesh K. Kumra, 5 FCC Rcd. at 5607.

The communications between an attorney and his client must also relate to the provision of legal advice or services. See, e.g., Arthur Andersen, 139 F.R.D. at 300; United States v. Rockwell Int'l, 897 F.2d 1255, 1264 (3d Cir. 1990) ("[t]he sine qua non of any claim of privilege is that the information sought to be shielded is legal advice"); Grossman, 125 F.R.D. at 385. Thus, the attorney-client privilege does not protect client communications that relate solely to business or technical advice, or that do not involve the exercise of the attorney's legal skills. See Simon v. G.D. Searle & Co., 816 F.2d 397, 403 (8th Cir. 1987), cert. den., 484 U.S. 917 (1987); Western Trails, 139 F.R.D. at 11, 13; Arthur Andersen, 139 F.R.D. at 300; Black Television Workshop, 7 FCC Rcd. at 6869.

In the present case, any instructions from Liberty to Mr. Lehmkuhl to perform, or not to perform, a particular act, such as an instruction not to file STA requests for pending applications unless specifically asked to do so, are not protected by the privilege because they are not communications conveying facts for the purpose of obtaining legal advice from Mr. Lehmkuhl.² Similarly, communications from an attorney to his client in which the attorney is simply reporting on some action or development with which the client may be concerned,

²See Lehmkuhl Dep. of August 7, 1996, at 159-62.

but which do not reflect confidential information provided by the client or legal advice or opinions rendered by an attorney, are not protected by the privilege. William F. Peel, Jr., 6 FCC Rcd. 5301, 5302 (1990); Raveesh K. Kumra, 5 FCC Rcd. at 5607. Thus, documents such as Mr. Lehmkuhl's February 24, 1995 memorandum, which was the subject of Mr. Lehmkuhl's August 7, 1996 deposition, is not protected by the privilege, because it is simply a report of the status of Liberty's various OFS microwave applications, and does not render any legal advice.

The privilege also does not protect the underlying facts of a confidential communication; it protects only the communication itself. See Upjohn, 449 U.S. at 395-96; Grossman, 125 F.R.D. at 385; Amarin, 116 F.R.D. at 41. While an adverse party can refuse to disclose what he said or wrote to his attorney, he cannot decline to disclose relevant facts merely because those facts were related to an attorney. See Massachusetts v. First Nat'l Supermarkets, Inc., 112 F.R.D. 149, 152 (D. Mass. 1986); Grossman, 125 F.R.D. at 386; Upjohn, 449 U.S. at 396 (citing Philadelphia v. Westinghouse Elec. Corp., 205 F. Supp. 830, 831 (1962)). For example, an inquiry regarding whether the attorney and client spoke on a particular occasion does not invade the privilege because such an inquiry calls only for the disclosure of a fact (i.e., the occurrence of a communication), and not for the substance of that communication.

Similarly, the privilege attaches only to the "substance of communications, and does not prevent inquiries into the subject matter thereof." Nemet v. Hyundai Motor America, 1989 U.S. Dist. LEXIS 1994, *4 (E.D.N.Y. 1989); see also Westhemeco Ltd. v. New Hampshire Ins. Co., 82 F.R.D. 702, 707 (S.D.N.Y. 1979) (inquiries into general nature of

legal service performed do not invade the protection of the privilege because they do not call for confidential communication). Thus, an inquiry regarding the nature of a conversation, such as that posed to Mr. Lehmkuhl on page 41 of his May 22, 1996 deposition, is not protected by the privilege.

Finally, the privilege does not protect communications that were sent, or otherwise related, to an attorney solely for the purpose of "trying to create a screen against discovery, [when] the content of the document indicates it is neither work product nor a communication subject to the attorney-client privilege." Air Crash Disaster, 133 F.R.D. at 520; see also Western Trails, 139 F.R.D. at 13 (corporate dealings are not made confidential by funnelling them through an attorney); RTC v. Diamond, 137 F.R.D. 634, 643 (S.D.N.Y. 1991); Grossman, 125 F.R.D. at 386 (presence of documents in an attorney's files does not automatically mean that the privilege attaches).

Respectfully submitted,

Christopher A. Holt / dam
by consent

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Dated: January 8, 1997

CERTIFICATE OF SERVICE

I, Debra A. McGuire, hereby certify that a copy of the foregoing Memorandum of Law Regarding the Attorney-Client Privilege was served, via facsimile, this 8th day of January, 1997 upon the following:

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